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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARK DUTKEWYCH,

Plaintiff,

Civil Action
No. 12-11073-DJC

V.

STANDARD INSURANCE COMPANY,

December 12, 2013
2:18 p.m.

Defendant.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
joycedebra@gmail.com

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 MALA M. RAFIK, ESQ.
4 S. STEPHEN ROSENFELD, ESQ.
5 Rosenfeld Rafik & Sullivan, P.C.
6 184 High Street
Suite 503
Boston, MA 02110
617-723-7470

7 FOR THE DEFENDANT:

8 BROOKS R. MAGRATTEN, ESQ.
9 Pierce Atwood LLP
72 Pine Street, 5th Flr.
10 Providence, RI 02903
401-588-5113

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on December 12, 2013.)

THE CLERK: Civil action 12-11073, Mark Dutkewych v. Standard Insurance Company.

Would counsel please state your name for the record.

MS. RAFIK: Good afternoon, your Honor. Mala Rafik, I'm here with Steven Rosenfeld for the plaintiff, Mark Dutkewych.

THE COURT: Good afternoon, counsel.

Good afternoon.

MR. ROSENFELD: Good afternoon.

MR. MAGRATTEN: Good afternoon, your Honor. Brooks Magratten for The Standard Insurance Company.

THE COURT: Good afternoon, counsel.

Counsel, I know I have cross-motions for summary judgment. I have reviewed the papers, I'm prepared to hear argument. I actually don't recall which of them was filed first, but I suppose we can start with the plaintiff, then I'll give defense counsel, as well, an opportunity for argument.

MS. RAFIK: Thank you, your Honor. I wanted to just note that my client is here in the courtroom, as well, today.

1 With your permission, your Honor, I'd like to reserve
2 two minutes for rebuttal.

3 THE COURT: Sure.

4 MS. RAFIK: Thank you.

5 So I intend to address three issues today, your Honor.
6 First, looking at the record as a whole, Mr. Dutkewych has met
7 his burden of proving that at the only relevant time at issue
8 in this case, June 2011, he was disabled due to a physical
9 condition, lyme disease, and the symptoms of that condition
02:20 10 alone.

11 Second, The Standard's conclusion that Mr. Dutkewych's
12 disability was due to mental illness or fibromyalgia is not
13 based on the substantial evidence in the record and should not
14 be given deference by this Court.

15 And third, your Honor, Standard's late-in-the-day
16 interpretation of the mental illness limitation is inconsistent
17 with its interpretation in this case and in other cases and is
18 a *post hoc* rationalization undeserving of deference.

19 First, and most important, your Honor, there is no
02:20 20 dispute in this case that Mr. Dutkewych is disabled. He cannot
21 work in his own occupation as an attorney, and he cannot work
22 in any occupation. Standard fully concedes this point. The
23 record establishes that he suffers from a debilitating illness,
24 chronic lyme disease, or as the CDC calls it, post-treatment
25 lyme disease syndrome. His symptoms really fall into two

1 camps, your Honor. The first is cognitive limitations, and the
2 second are independently disabling physical symptoms, including
3 joint pain and swelling, otherwise known as joint arthritis;
4 fatigue; headaches; and visual disturbances; all of which are
5 consistent with the clinical picture of lyme.

6 When he first began exhibiting these symptoms, now
7 five years ago, lyme did not enjoy the same understanding in
8 medicine or the prominence in the media that it enjoys today.
9 And that really, your Honor, is the first tragedy of this case.

02:21 10 Mark suffered with worsening symptoms and worsening
11 pain with simply no relief, except the pain medication that was
12 constantly given to him to address the symptoms but really with
13 no insight as to their cause. He, unfortunately, became
14 addicted to this pain medication. Depression later set in
15 when, after seeing over 15 specialists, he was told by a
16 rheumatologist that he simply needed to will himself to get
17 better. He was hospitalized, he underwent ECT treatment, and
18 lived in residential treatment facilities for several months
19 before being correctly diagnosed and treated.

02:22 20 After he began receiving IV antibiotic treatment for
21 lyme and an IV was inserted in both his arm and his chest,
22 Mark's mental health symptoms began to subside, and he has been
23 able to maintain sobriety since March 2010.

24 The second tragedy in this case is that Mark's
25 diagnosis came far too late. By the time he began receiving

1 treatment, the lyme infection had destroyed Mark's body, the
2 body of a one-time American athlete, and it has destroyed his
3 brain, a mind that had led him to a successful career in public
4 finance at Mintz Levin.

5 Your Honor, Mark is now totally disabled due to
6 chronic lyme disease, and it's a total disability that
7 Standard's own life insurance department acknowledges is due to
8 chronic lyme. Standard's disability division, however,
9 attempts to split hairs, simply in an attempt to avoid
02:23 10 liability. It acknowledges that Mark suffers from physically
11 disabling symptoms, but it claims that chronic lyme just isn't
12 real. As a result --

13 THE COURT: But, counsel, isn't there a fair amount of
14 evidence in the record disputing that diagnosis?

15 MS. RAFIK: Of chronic lyme, your Honor, with respect
16 to Mark or just generally?

17 THE COURT: As to -- well, both, both.

18 MS. RAFIK: Okay.

19 So let me take first the more general issue of chronic
02:23 20 lyme. So there certainly is a political debate out there, your
21 Honor, regarding chronic lyme or there has been a political
22 debate. I would say that the sands are very much shifting in
23 that regard.

24 In 2013, for instance, four cases dealt with the issue
25 of chronic lyme and whether chronic lyme existed and whether it

1 was disabling. In all four cases the courts found, based on
2 the CDC criteria, that, number one, chronic lyme did exist; and
3 that, number two, the individuals were disabled as a result.

4 Similarly, in medicine you're seeing a constant change
5 in the way medicine is treating chronic lyme, as evidenced,
6 actually, in the medical literature we've included in this
7 record in this case. But more importantly with respect to Mark
8 and really the four corners of this record, your Honor, there
9 are at least eight objective tests that support the existence
02:24 10 of chronic lyme.

11 The first is that Mark has been diagnosed on two
12 Western blot tests as having chronic lyme. In the Gent case in
13 the 1st Circuit, the court found important that the plaintiff
14 had never been diagnosed on Western blot with lyme disease.
15 Mr. Dutkewych has two positive Western blot tests.

16 Second, and perhaps more importantly, Mr. Dutkewych
17 underwent a spinal tap at Brigham & Women's Hospital, it was
18 read at Brigham & Women's Hospital, and it showed elevated
19 protein in the fluid. These results were -- this test was
02:25 20 really ordered by Mark's primary care physician, Dr. K.
21 Isselbacher, but the results shared with three lyme experts
22 that have no involvement in this case: a doctor from Johns
23 Hopkins, a doctor from Columbia School of Medicine, and a
24 doctor from Beth Israel. All three of those doctors concurred
25 based on that spinal tap that Mr. Dutkewych had chronic lyme

1 disease and decided to insert is a port into his arm and treat
2 him with intravenous IV fluids.

3 There's a number of other tests, your Honor. There's
4 a SPECT scan that shows diminished blood flow to the brain that
5 Dr. Raxlen, who is a lyme expert, he's treated over 4,000
6 individuals with lyme disease, he felt that the results of the
7 SPECT scan were consistent with chronic lyme. There's an
8 abnormal EEG that was consistent with cerebral disorder that
9 was felt to be consistent with chronic lyme. There is also --
02:26 10 there's also -- just one last point I'd like to make, there's
11 also Dr. Trempe, who's a Harvard professor, who found that Mark
12 had changes in his vision that's consistent with what he sees
13 with chronic lyme. These are indisputable objective tests.

14 More importantly, your Honor, the CDC has said, and
15 they just revised their clinical definition of lyme, they have
16 said very clearly that lyme is a clinical diagnosis, it is
17 based on clinical exam.

18 So there are at least seven doctors who have examined
19 Mark and who have determined, based on his clinical
02:26 20 presentation, that he suffers from chronic lyme.

21 To answer your question, your Honor, on the other side
22 we have Drs. Dattwyler and Sigal, both of whom were retained --
23 both of whom were retained by Standard who found otherwise, and
24 they're really the contrary evidence that your Honor is
25 referring to.

1 THE COURT: And isn't -- weren't there negative tests,
2 counsel?

3 MS. RAFIK: There were. There were a number of
4 negative ELISA tests. So the way that lyme works is the first
5 test that's offered is the ELISA test. It's often -- I think
6 the statistic -- it's in our brief -- but I believe it's over
7 60 percent inaccurate. It often shows a false positive, it can
8 also show a false negative. The next step is to go to the
9 Western blot, which is much more sensitive to the existence of
02:27 10 lyme.

11 But I do want to caution your Honor that the CDC has
12 said that while testing is helpful for the diagnosis, it is not
13 necessary to make a diagnosis of lyme. And this is where I
14 think a lot of the misunderstanding has really occurred, both
15 in this case and in prior cases before this year. The CDC
16 issues two separate sets of criteria, one is surveillance
17 criteria, and it's part of their attempt to sort of gather
18 information as to how many people nationally suffer from lyme.
19 The surveillance criteria require positive blood tests to
02:28 20 demonstrate the existence of lyme. They're trying to capture
21 sort of -- they're trying to measure how many people have lyme
22 in the country. On the other hand, they're very clear that the
23 diagnostic criteria do not require positive blood tests. What
24 they require is a clinical examination.

25 It's important to note, your Honor, however, that

1 Mr. Dutkewych, in the record -- the record shows that
2 Mr. Dutkewych actually even meets the surveillance criteria.
3 When he was initially diagnosed with lyme by Dr. Hubbuch, she
4 sent his lyme -- the Western blot to the Mass. Department of
5 Public Health, who reviewed the results of the clinical exam
6 and the results of Western blot and certified that Mark met the
7 clinical criteria, the surveillance criteria, for chronic lyme
8 as established by the CDC, and sent his results on to the CDC
9 as a confirmed case of lyme.

02:28 10 THE COURT: Counsel, I guess one of the questions I
11 have for you, and isn't this a similarity with the Gent case in
12 regards to isn't there evidence in the record here of a history
13 of other mental conditions and disorders that would weaken the
14 probability of lyme disease?

15 MS. RAFIK: Thank you for asking that question, your
16 Honor. I welcome the opportunity to respond to that.

17 Mark had a history of OCD. It was diagnosed in 2004,
18 and it really manifested itself in a desire to be neat and
19 clean. He sought treatment with Dr. Paul Serrano at MGH, and
02:29 20 in 2004 had a number of visits, I believe, like, 14 visits.
21 But as the years progressed, those visits diminished down to
22 one. That was his history of mental illness. He was also 2001
23 in a severe car accident, where a man on heroin killed somebody
24 else after crossing a median and Mark was hit by a car. He
25 took Vicodin for six months or I think it was OxyContin for six

1 months to address his symptoms, he was flat on his back
2 following that accident; but after six months he proactively
3 engaged in a PT session three to four hours a day to get better
4 and he did and he was off his meds. That's his history of
5 substance abuse and mental health treatment, although he had
6 some sporadic depression, but nothing -- depression with a
7 small D throughout life because of unhappiness with his job.
8 But that was it before he was bitten by a tick in 2007.

9 And what happened in 2007, your Honor, is that he
02:30 10 started having all these physical symptoms. He was bleeding
11 from different orifices, he was having pain, he was dropping
12 things, he was clumsy, he was forgetting things, he was
13 extraordinarily tired, and he went from specialist to
14 specialist, rheumatologist to gastroenterologist; and all
15 anybody could say to him is, We don't know. We can offer a
16 differential diagnosis but we really don't know what the cause
17 is. And what every single doctor did is give him pain
18 medication, and it was that pain medication that caused him to
19 become addicted. It was the only thing that he had that helped
02:31 20 his symptoms. So when he was ultimately -- when he was
21 ultimately admitted to McLean Hospital, he said to McLean
22 Hospital, Substance abuse has been the biggest cause of the
23 problems in my life. But what he was referring to was the
24 arrest that had occurred the day before and the substance abuse
25 that had destroyed his life in the year prior. After all, he

1 had lost his job, he had lost his health, and he had been told
2 by doctors, We have no idea what's wrong with you. But that
3 substance abuse and that depression that set in at that time
4 stood alone, your Honor, it wasn't a part of long-term history,
5 as Standard would like to portray Mark. Certainly there are
6 references in the record to Mark doing drugs in college;
7 contrary to what Standard says, that drug use ended in college,
8 the records are very clear. We've made those points in our
9 brief. But this history of mental illness and substance abuse
02:31 10 occurred in the context of the missed diagnosis. And when he
11 was correctly diagnosed, those symptoms subsided to the degree
12 that he went off Flexapro in 2010 because he was doing so well.
13 And he hasn't used, since March 2010, any substance for pain.

14 The second point I'd like to make just went right out
15 of my head, but there is a second point to answer your
16 question --

17 THE COURT: But I guess, and I think there is a
18 difference in opinion between the parties in terms of what time
19 period I should be looking at. I understand your argument to
02:32 20 be that I need to look at 2011.

21 MS. RAFIK: That's right, June 2011.

22 THE COURT: As of the condition of 2011. What, if
23 anything, would you have me make of the decision about the
24 long-term disability claim being allowed in 2009 based on his
25 mental conditions?

1 MS. RAFIK: Certainly. And that was -- actually, you
2 took me right to the point I was going to make, your Honor.
3 The Gent case -- this is where the similarity is, in the Gent
4 case of course. Mrs. Gent filed her claim based on psychiatric
5 conditions, as Mark did. But the difference in the two cases
6 is one year later Mrs. Gent was diagnosed with lyme disease.
7 She was bitten by a tick one year into her claim. She didn't
8 start her claim with lyme disease, she only had a mental
9 illness.

02:33 10 In Mark's case he started his claim with lyme disease
11 and with mental illness. If you look at Standard, Standard has
12 a new claim intake form, and on their new claim intake form
13 when they approved Mr. Dutkewych's claim for short-term
14 disability, they made the point that his psychiatric condition
15 was more prominent at the time, which it most certainly was,
16 his doctors were attempting to deal with his depression and
17 addiction issues that had occurred in search of a cure, but it
18 was very clear in their notes that lyme had been referenced as
19 a possible cause of his symptoms. He had started IV antibiotic
02:34 20 treatments -- not IV antibiotics, I'm sorry, oral antibiotics
21 at the time his claim was filed, and his physical condition
22 occurred at the same time, or the claim was filed with both in
23 mind.

24 The second point to make here, your Honor, is that
25 Mr. Dutkewych's lyme disease, physical condition, is, in fact,

1 what caused his addiction and his depression, unlike the Gent
2 case, they're completely isolated conditions.

3 Moreover, in the Gent case, your Honor, there was --
4 Mrs. Gent's own doctors couldn't concur as to what was causing
5 her symptoms. Some of her own doctors thought that her illness
6 was due to mental illness as opposed to lyme disease.

7 In Mr. Dutkewych's case there are three psychiatric
8 providers, Dr. Statlender, Dr. Raxlen, and Dr. Shea, and all of
9 whom have opined that Mr. Dutkewych does not suffer from
02:34 10 disabling mental health conditions, period.

11 More importantly, The Standard's only psychiatric
12 reviewer, and he was a neuropsychologist, Dr. Gant, is the only
13 doctor that Standard retained to review the entire file. He
14 stated unequivocally that he could not -- that there was no
15 limitations due to a psychiatric condition, and that he could
16 not render a determination as to whether or not Mr. Dutkewych
17 even had a psychiatric condition that was disabling.

18 There's not one shred of evidence in this record, your
19 Honor, that supports a finding that Mr. Dutkewych -- by any
02:35 20 doctor -- was disabled as of June 2011 from a psychiatric
21 condition, unlike the Gent case.

22 THE COURT: Okay.

23 MS. RAFIK: I will make one more point, your Honor --

24 THE COURT: Can I just interrupt?

25 MS. RAFIK: Oh, of course.

1 THE COURT: I recall that Social Security has made a
2 determination of disability, and what was the timing of that?
3 What was the -- both the timing of that decision and what time
4 period does it cover?

5 MS. RAFIK: So we applied for Social Security for
6 Mr. Dutkewych immediately at the time he became disabled, so we
7 handled his application, and that was in early 2009 is when his
8 application went in. Social Security Administration found in
9 2010, and I believe it was in June of 2010, that Mr. Dutkewych
02:36 10 suffered from -- was disabled due to both depression and due to
11 lyme disease. But what they said -- and both conditions were
12 severe. The medical records that they had to make the
13 determination regarding the depression, and they list this in
14 the opinion that's in the record, your Honor, is his
15 psychiatric treatment records from McLean Hospital and from
16 Cambridge Hospital that were in 2008 and early in 2009. They
17 didn't have anymore current psychiatric records. The lyme
18 disease they found to be severe, but they felt, or Judge Fallon
19 felt that his psychiatric condition would probably resolve
02:36 20 within a year, and that was clear in the opinion.

21 THE COURT: Thank you.

22 MS. RAFIK: You're welcome, your Honor.

23 So if I may, your Honor, I'd like to make just --
24 you've actually helped me with my second point, but I'd like to
25 make just a couple of more points with respect to Standard's

1 discretion and its reliance on Dr. Sigal, Dr. Dattwyler, and
2 Dr. Gant.

3 Dr. Sigal, Dr. Sigal's entire report is sort of based
4 on the promise that chronic lyme doesn't exist. He cites to no
5 authority in that regard, and he does nothing to refute
6 Mr. Dutkewych's treatment providers' diagnosis of lyme, except
7 to say there's this whole group of doctors out there that make
8 a living out of telling people they have chronic lyme when they
9 really don't.

02:37 10 Mr. Dutkewych's treatment providers span the entire
11 gamut up and down the East Coast, and it really defies logic to
12 think they're in cahoots together to make money off of
13 Mr. Dutkewych. Regardless, Dr. Sigal provides no medical
14 support for his report.

15 Dr. Dattwyler is really the more sort of thorough
16 report here in this case that Standard based its decision on.
17 I was looking at Dr. Dattwyler's report today. He has about 45
18 different citations, 45 different footnotes, and the vast
19 majority of those footnotes are from medical research that was
02:38 20 done in the 1990s.

21 For instance, Dr. Dattwyler says -- and this is a big
22 part of his claim that Mr. Dutkewych never had lyme -- he said,
23 Well, Mr. Dutkewych never had the rash, the EM rash that is
24 required to diagnose lyme. He says that happens in 90 percent
25 of people. The citation he uses is from 1998. The CDC said in

1 2011 and it's as of today, I checked its website today, that 70
2 to 80 percent of people never -- get the rash but the rest
3 don't. And in fact, for the surveillance criteria, actually
4 having the rash is not necessary for a diagnosis of lyme.

5 Moreover, he says you have to have -- that psychiatric
6 manifestations of lyme aren't credible, they don't exist.
7 Again, he's citing to case studies from the 1990s. That's been
8 absolutely reputed. The medical evidence in the record from
9 the late 2000s says quite otherwise.

02:39 10 He also says that neurological lyme disease is rare
11 based on investigations from 2001 to 2006. Just this year the
12 CDC says we've been underestimating by 300,000 the number of
13 people who have lyme.

14 The problem with Dr. Dattwyler's report, your Honor,
15 is that his medicine is outdated. And he ultimately never
16 deals with the clinical -- with Mark's clinical picture. He
17 makes three references in his report that Mark doesn't meet the
18 clinical picture of lyme, but if you look at his report, he
19 never explains why. Three times he makes that blanket
02:39 20 statement, but he never says, Well, what symptoms does Mark
21 have that don't meet the clinical picture? In fact, Mark's
22 doctors, Dr. Raxlen, Dr. Hubbuch, Dr. Ruiz, both painstakingly
23 did clinical evaluations of Mark and said, He meets the
24 clinical picture of lyme, he meets the picture that we see in
25 the thousands of patients that we see with lyme disease, and he

1 meets the clinical picture as supported by the CDC.

2 The 1st Circuit has sort of repeatedly said, Look, if
3 there's contrary evidence in the file, discretion always wins,
4 discretion is the trump card, but it has also very clearly said
5 that you have to acknowledge and respond to the contrary
6 medical evidence. It's not enough to say -- to throw up your
7 hands and say, Well, there's conflicting evidence, we win,
8 discretion trumps. You have to actually deal with the evidence
9 that's in front of you, and I actually think --

02:40 10 THE COURT: Even if, as you suggest, the medical
11 studies and medicine's understanding of the condition have
12 evolved since Standard made its decision?

13 MS. RAFIK: Yes. But, your Honor, the medical studies
14 are in the record. So the medical studies that we cite to are
15 in the record. Certainly the 300,000-person cite I just made
16 to your Honor is not in the record, but everything else I've
17 said is in the record. And we have included in the record
18 medical literature from the late 2000s that supports the
19 existence of chronic lyme, unequivocally supports it.

02:41 20 Your Honor, Judge Woodlock just recently in Petrone
21 said -- when thinking about this concept of conflicting medical
22 evidence and discretion, he said, An administrator cannot
23 simply ignore contrary evidence or engage only with that
24 evidence which supports his conclusion. In our opinion, your
25 Honor, that's precisely what happened here. If you look at

1 Dr. Dattwyler's and Sigal's reports, they don't ever look at
2 Dr. Raxlen's record or Dr. Raxlen's clinical evaluations or
3 Dr. Ruiz' or any of the evidence set forth by Mark. They
4 simply take the evidence -- they simply just write off the
5 doctors as quacks hurrying to make some money, but they never
6 deal with the evidence, and that's the problem with their
7 reviews here. It's not enough. You can't hide behind the
8 shield of discretion, unless you do the review that's required
9 by ERISA.

02:42 10 So just one final point, if I may, your Honor --

11 THE COURT: Yes.

12 MS. RAFIK: -- at the 11th hour The Standard raised in
13 its reply brief a new argument that hasn't been raised before
14 in this case.

15 So they said that if you have cognitive limitations
16 that are disabling, regardless of their cause, whether it's
17 physical or mental, then your case is limited to two years of
18 benefits under this plan.

19 This is a *post hoc* rationalization, your Honor, and
02:42 20 the 1st Circuit in Glista v. Unum shut down such *post hoc*
21 justifications, that the insurance company can't come up with
22 any justification at any time to justify the denial of
23 benefits.

24 During the internal appeals process in this case, I
25 specifically asked the appeals handler, Linda Wheeler, I asked

1 her, If someone has cognitive limitations that are derived from
2 a physical cause, does that -- is that claim limited to two
3 years? And she said, No. Her notes are very clearly detailed
4 in the file, they've been cited in our briefs, and I have
5 copies here today. But she said, If you have cognitive
6 limitations that are due to a physical cause, whether it's lyme
7 disease or cancer, then you have a physical disease or injury
8 that is payable beyond two years.

9 The Standard now argues in its brief that she's wrong.
02:43 10 She is not a lawyer, she's wrong, even though she was the
11 person responsible for interpreting the policy and the plan in
12 this case. But what doesn't make sense here, your Honor, is if
13 The Standard's interpretation is correct, their late-in-the-day
14 interpretation is correct, there simply wouldn't have been any
15 need to further investigate Mark's case after the neuropsych
16 testing that was done by Dr. Shea in May 2011 found him to be
17 totally disabled from cognitive limitations of lyme. The case
18 should have stopped there. There would have been no need to
19 spend \$25,000 on Dr. Dattwyler and on Dr. Gant's review to
02:44 20 determine the cause of Mr. Dutkewych's cognitive limitations,
21 it would have been unnecessary.

22 Similarly, such an interpretation of the policy is
23 nonsensical. It would mean that anybody who suffers from any
24 sort of physical condition that causes disabling cognitive
25 limitations, whether it's cancer, a traumatic brain injury,

1 would be limited to two years of benefits. It's not what the
2 policy calls for, it's not in the contract.

3 Your Honor, in preparation for this argument, I went
4 to Pacer and I tried to pull as many cases that I could find
5 where this issue had come up, this policy provision. What I
6 did pull was the case where all the briefs in the Schwob case
7 that Standard cites to where this provision was at issue, and I
8 found another case called Oster that was decided in 2011 where
9 the man did, in fact, suffer from a traumatic brain injury and
02:45 10 his only disabling symptoms were cognitive. In neither one of
11 those cases did The Standard raise the policy interpretation
12 it's now raising at the 11th hour in this case. Because it's a
13 *post hoc* rationalization, because it's ERISA implementing
14 regulations that require meaningful dialogue during the
15 internal appeals process, this Court cannot just give deference
16 to this new policy interpretation by The Standard.

17 THE COURT: What relief do you seek here? Meaning,
18 are you seeking remand or -- is that what you're seeking?

19 MS. RAFIK: No, your Honor. We're seeking an award of
02:45 20 benefits here, and I'll tell you why remand is inappropriate in
21 this case.

22 If your Honor determines -- well, let me start here.
23 There's no dispute that Mr. Dutkewych is disabled, unlike the
24 vast majority of ERISA cases your Honor likely sees. So if
25 your Honor determines that chronic lyme could have caused or

1 caused Mr. Dutkewych's disability, then there's simply no
2 reason to remand this case, benefits can be awarded.

3 Secondly, your Honor, this case is 51 pages -- 5,100
4 pages long. There's no dispute here. There's no claim that
5 there is a procedural irregularity that would necessitate a
6 remand. The record is what the record is, and if Mr. Dutkewych
7 is disabled, then, as Standard's Life Insurance Division says,
8 it's due to chronic lyme disease, then he should be awarded the
9 benefits he is due.

02:46 10 Thank you, your Honor.

11 THE COURT: Thank you, counsel.

12 Counsel, I'll hear from you.

13 MR. MAGRATTEN: Thank you, your Honor.

14 The case presents a very long and detailed factual
15 record, but the legal issue, I think, is fairly narrow. The
16 parties have briefed the facts on this extensively.

17 It's clear that Mr. Dutkewych, in some respects, has
18 been quite accomplished, both as an athlete and as an associate
19 who was employed in one of the larger firms in town. In other
02:47 20 respects, however, he's been burdened with a terrible history
21 of depression, anxiety, drug addiction leading to criminal
22 convictions, obsessive-compulsive disorder, and fibromyalgia.
23 His history includes both inpatient and outpatient psychiatric
24 hospitalization programs, self-mutilation, and contemplated
25 suicide.

1 His last day of work as an associate was October 3 of
2 2008. He applied to Standard for benefits under their
3 long-term disability plan, and there's no dispute Standard paid
4 for two years and then terminated benefits under the
5 disability's subject-to-limited-pay-periods provision of the
6 policy.

7 I think it's important at this point to take a step
8 back and ask a fundamental question: Why at the end of that
9 two-year period was Mr. Dutkewych disabled from working as an
02:48 10 attorney? And the argument is never raised that he was
11 incapable at that point in riding the T into work or sitting at
12 a desk. The argument has been consistently presented in the
13 administrative record that Mr. Dutkewych could not work at that
14 time because of cognitive dysfunctions. He wrote Standard on
15 April 27, 2011, about a month before benefits were terminated,
16 in which he stressed that cognitive issues are often the most
17 troubling for me. He added, Despite working with my therapist
18 weekly and taking anti-depressant medications, depression and
19 anxiety continue to be an issue. And if you examine the record
02:48 20 from the perspective of the medical treatment and attention
21 that was given at that time, it was all based on his cognitive
22 difficulties.

23 THE COURT: And I guess -- I guess, counsel, my
24 question is, isn't there evidence in this record that that
25 mental condition may not be the cause but may be the symptom of

1 this other physical condition, of the chronic lyme disease?

2 MR. MAGRATTEN: That is certainly the argument. That
3 is certainly the argument, your Honor.

4 The -- if I can try to focus the dispute here a little
5 bit, the -- really the parties are arguing on one page of the
6 policy, of the plan. It's in administrative record, it's page
7 826, the provision about disability is subject to limited pay
8 periods. This section states that disabilities based on mental
9 disorders, which are broadly defined to be any mental,
02:49 10 emotional, behavioral, psychological, personality, cognitive,
11 mood or stress-related abnormality, et cetera, are limited to
12 24 months. There is also a restriction for chronic fatigue
13 conditions such as fibromyalgia. And there's no dispute
14 between the parties that Standard paid two years under that
15 provision, and from the outset Standard cautioned Mr. Dutkewych
16 that the claim may be subject to this limited pay period. In
17 the end, Standard terminated benefits because of the limited
18 pay period.

19 The key provision is at the bottom of the page, there
02:50 20 is a provision that says, Rules for disabilities subject to
21 limited pay periods. And what it says is if you are disabled
22 as a result of a mental disorder or any physical disease or
23 injury for which payment of benefits is subject to a limited
24 pay period and at the same time are disabled as a result of a
25 physical disease, injury or pregnancy that is not subject to

1 such limitation, LTD benefits will be payable first to the
2 conditions that are subject to the limitation. No LTD benefits
3 will be payable after the end of the limited pay period unless
4 on that day you continue to be disabled as a result of a
5 physical disease, injury or pregnancy for which payment of LTD
6 benefits is not limited.

7 So clearly the plaintiff's focus here is to say, Yes,
8 my condition is a mental disorder; however, because the root
9 cause is not just lyme disease, but chronic lyme disease, that
02:51 10 underlying physical condition carries me beyond the two years.
11 And they really -- this proposition rests on three -- excuse
12 me -- the argument rests on three propositions. The first is
13 that chronic lyme disease exists, and the plaintiff in briefs
14 makes his argument forcefully. And I would add, as well,
15 references to the CDC's website as of today and some other
16 references in the brief are clearly outside the administrative
17 record and should not be considered by this Court.

18 THE COURT: But even among the folks, or rather the
19 doctors and psychologists and the other specialists here, there
02:52 20 seems to be some disagreement. Meaning, that even putting
21 aside any reference to materials that might be outside of the
22 record, there seems to be some dispute among the treating
23 doctors and the reviewing doctors about whether or not this is
24 actually a condition; is that --

25 MR. MAGRATTEN: Correct. And I think the plaintiff,

1 for a number of reasons, would like a judicial stamp of
2 approval on the diagnosis of chronic lyme disease, and
3 Standard's position is that is not an issue this Court needs to
4 decide, it's not an issue this Court should decide. That is an
5 issue for medical science to decide in the fullness of time on
6 a fact record much bigger than what's presented in this case.
7 The Court does not need to consider this because it's -- given
8 the deferential standard of review, it's not really for the
9 Court to weigh the evidence between --

02:53 10 THE COURT: No, I understand your point in regards to
11 the deference I'm required to apply here, but here, as your
12 sister argued, it appears that the initial application for
13 disability benefits cited not only mental condition but this
14 lyme disease condition, and there appears to be, based on the
15 record, not on anything outside the record, but based on the
16 record to be some developing opinion among at least the
17 plaintiff's treating doctors about the effects of lyme disease.

18 So even without reaching the question of whether or
19 not this diagnosis exists as a matter of medical science, isn't
02:54 20 there enough here to say that there was an abuse of discretion
21 in terms of treating something as a cause versus a symptom of a
22 physical condition?

23 MR. MAGRATTEN: No, because of the wording of the
24 plan. I think we're getting to the real heart of the issue
25 here.

1 The policy defines mental disorder as any mental,
2 emotional, behavioral, psychological, personality, cognitive,
3 mood or stress-related abnormality, et cetera. It goes through
4 the long list, but the important qualifier says, regardless of
5 cause, including any biological or biochemical disorder or
6 imbalance of the brain or the presence of physical symptoms.

7 So let's step back and assume for the moment, yes,
8 Mr. Dutkewych had chronic lyme disease for sake of argument,
9 and let's assume that chronic lyme disease produced cognitive
02:55 10 dysfunction which is what prevents him from working as an
11 attorney today. Under the language of the definition of mental
12 disorder, it doesn't matter, it doesn't matter.

13 And now we get to, I think, what is the nub of the
14 matter that Ms. Rafik alluded to. In the brief she writes she
15 called the disability analyst at Standard, who is not an
16 attorney, asked the question, Well, what happens if he does
17 have this lyme disease and it's lyme disease that's continuing,
18 does the 24-month limitation apply? The key part of the
19 administrative record, there are two documents I think the
02:56 20 Court should review. One is an internal handwritten memorandum
21 by the analyst, and that appears in administrative record at
22 page 722, and in this handwritten memo the analyst refers to
23 that telephone conversation. There is also a letter from
24 Ms. Rafik to Standard, which appears in the administrative
25 record at page 649. And if the Court looks at the two

1 documents, I think the Court will conclude that it's not at all
2 clear that Ms. Rafik and the analyst came to a common
3 understanding of what the plan does. But even for sake of
4 argument, let's assume the analyst said, You're correct, if
5 Lyme disease is the underlying problem, the 24-month limitation
6 will not apply. That's not what the plan says, plainly and
7 simply.

8 THE COURT: And what do you say about your sister's
9 argument that this is a *post hoc* rationalization that I
02:57 10 shouldn't reply upon?

11 MR. MAGRATTEN: This is not Glista; this is the plain
12 language of the policy and the plan. The plan also provides
13 the plan will not be amended, except in writing, signed by a
14 senior executive of Standard, plainly not the case here. And
15 also, if the Court examines the Glista case -- I'm sorry, not
16 Glista -- Livick v. Gillette, where you have a claimant who
17 called an administrator, received an erroneous estimate of
18 benefits and Mr. Livick pressed his claim, and if he were to
19 prevail, it would essentially result in a rewriting of the
02:58 20 plan, which the 1st Circuit refused to do.

21 I think in the circumstances here, at best you get --
22 the Court is presented with two different stories of what was
23 said in that phone conversation, and in a case of this type,
24 where it's fundamentally a review of the administrative record,
25 it's inappropriate for the Court to engage in the kind of

1 fact-finding to determine what was really said in that
2 conversation.

3 At the end of the day, to apply the plan as the
4 plaintiff has asked it to be applied would require a rewriting
5 of the plan, which contravenes a great body of ERISA
6 jurisprudence. The ERISA jurisprudence states foremost the
7 court's function is to apply the terms of the plan.

8 The relevant issue here is really the application of
9 the limited pay provision and the rules provision at the bottom
02:59 10 of that page. Should the Court determine that the rules
11 provision had been inappropriately applied and that the claim
12 should be administered beyond two years, the appropriate remedy
13 at that point would be a remand to the administrator to
14 consider the claim beyond the two-year period, because on this
15 administrative record, that's all that has occurred to date, is
16 administration of the claim through the two years.

17 THE COURT: Thank you, counsel.

18 MR. MAGRATTEN: Thank you, your Honor.

19 MS. RAFIK: May I, your Honor?

03:00 20 THE COURT: Yes.

21 MS. RAFIK: I'd like to address the policy provision,
22 the policy language regarding the mental illness limitation.
23 There's two points to be made here.

24 First, your Honor is correct, if Mr. Dutkewych's
25 mental illness stems from his lyme disease, then the mental

1 illness limitation comes into play, but it only comes into play
2 if Mr. Dutkewych's mental illness symptoms caused or
3 contributed to his disability. And those are the operative
4 words. As of June 2011, mental illness did not cause or
5 contribute to Mr. Dutkewych's disability. He may have had
6 symptoms of anxiety and depression, but neither Standard's
7 doctors nor Mr. Dutkewych's doctors have ever opined that he
8 was disabled as a result of a mental disability, whether it was
9 caused by lyme or not.

03:00 10 The second point to be made is the cognitive
11 limitations. So the policy -- the mental illness limitation
12 very clearly says cognitive limitations, regardless of cause.
13 That's in the language, your Honor, which is what prompted me
14 to talk to Linda Wheeler during the internal appeals process.

15 Now, I appreciate that we wouldn't have been going
16 through the entire exercise we would have been going to
17 determine the cause of Mr. Dutkewych's symptoms if the policy
18 was interpreted in any way that we have set forth to your
19 Honor. But Ms. Wheeler, and I quote, says, Discussed the
03:01 20 presence of cognitive complaints alone would not cause benefits
21 to continue to be beyond mental disorder limitation. There
22 would have to be evidence that these difficulties were due to a
23 physical condition, such as a head injury, for benefits to
24 continue. And you can replace head injury with lyme disease.

25 Finally, your Honor, Mr. Magratten stated that the

1 entire case really revolves around Mr. Dutkewych's cognitive
2 limitations.

3 As Mr. Dutkewych has repeatedly stated in his
4 affidavits, as his doctors have repeatedly stated in their
5 statements, and I refer you to Dr. Ruiz' report on page 1746 of
6 the record or Dr. Raxlen's report, summary report, they list a
7 slew of physical complaints before they even get to his
8 cognitive disability. Mr. Dutkewych suffers from fatigue and
9 lethargy, pain and weakness and stiffness, joint swelling and
03:02 10 pain, joint arthritis, sleep difficulties, night sweats, weight
11 loss, before you even get to cognitive limitations. And we
12 have always alleged that those symptoms are independently
13 disabling for Mr. Dutkewych.

14 My final point is that Paul Blatchford, an independent
15 vocational examiner, did independent testing of Mr. Dutkewych,
16 and what he found during that testing is that Mr. Dutkewych,
17 who suffers from a tremor in his hand and pain and stiffness in
18 his hand, could not use a pencil to handwrite. I would submit
19 to your Honor that one needs their hands as an attorney to
03:02 20 handwrite, to use a mouse, to use a computer. It was --
21 it's -- the medical evidence, the physical evidence, even if we
22 take the cognitive out of it, your Honor, disables
23 Mr. Dutkewych from performing the duties of his own occupation.

24 THE COURT: What about your brother's final point
25 about if I were to agree with you, the appropriate remedy is

1 remand?

2 MS. RAFIK: Because -- actually, your Honor, there is
3 medical evidence in the record past the two-year point. The
4 two-year point ended on June 2011. The Standard has in its
5 possession medical records through 2012, through the beginning
6 of 2012 for Mr. Dutkewych --

7 THE COURT: But has it done a review of that period of
8 time?

9 MS. RAFIK: They haven't, your Honor. But I would say
03:03 10 that this happens in virtually every ERISA case, and 90 percent
11 of those cases we don't defer to a remand because The Standard
12 hasn't had an opportunity to review updated medical records.
13 The proper remedy is to award retroactive benefits and
14 reinstate benefits under the terms of the plan. At that point
15 in time, the insurance company can then review medical records
16 and determine if the individual still continues to be disabled.
17 That has been the remedy in ERISA cases since these cases
18 started to be litigated. And usually remand is used when
19 there's been a procedural irregularity or misapplication or
03:04 20 misinterpretation of the policy provision.

21 THE COURT: Thank you.

22 Counsel, do you want to jump in?

23 MR. MAGRATTEN: Yes, your Honor, because the parties
24 have cross-moved.

25 THE COURT: Yes.

1 MR. MAGRATTEN: I think the argument that there is a
2 physical disability that exists as of June 2011 is a relatively
3 new argument. Yes, there are medical records in the file that
4 talk about swollen joints and other physical issues, but that
5 is a far, far cry from substantial medical evidence that
6 Mr. Dutkewych was unable as of that time to do the physical
7 requirements of a sedentary job such as being an attorney.

8 Again, if you focus on the -- what the treating
9 physicians are concerned with at that time, I think it's
03:04 10 clearly the cognitive issues, and by Mr. Dutkewych's own
11 admission in his letter to Standard, that is his biggest
12 problem.

13 Thank you.

14 THE COURT: Thank you.

15 Thank you, counsel, for your advocacy on either side
16 of this issue today.

17 As I indicated, I had a chance to review the papers,
18 but I'll go back and review them again with your arguments in
19 mind.

03:05 20 Thank you very much.

21 THE CLERK: All rise.

22 (Court adjourned at 3:05 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR
Official Court Reporter

May 20, 2014
Date